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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX 2 TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 22d day of January 2002, to: ***Sangita K. Rao, Esq.,*** U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899; and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-11371-J
UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.
ZIMMERN BEHARRY,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

CRIMINAL APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Zimmern Beharry
Case No. App. No. 00-11371-J

Pursuant to 11th Cir. R. 26.1, Appellant Zimmern Beharry files this Certificate of Interested Persons and Corporate Disclosure Statement:

Atkinson, Karen, Assistant United States Attorney

Beharry, Zimmern, Defendant/Appellant

Black, Roy, BLACK, SREBNICK & KORNSPAN, Attorney for Appellant

Hurley, Daniel T.K., United States District Judge

Ng, Christine, BLACK, SREBNICK & KORNSPAN, Attorney for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully submits that oral argument would be helpful to the just resolution of this appeal and will significantly enhance the decision making process. The application of the United States Supreme Court's recent decisions in Apprendi and Castillo to the federal drug laws and Sentencing Guidelines is an issue of first impression and very significant. Further, this is a complex case with a large number of issues, many of which are fact-intensive. Oral argument would also assist this Court to resolve any ambiguities in the record.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the Defendant was charged with an offense against the laws of the United States. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. This appeal was timely filed on March 16, 2000. (R-552).

INTRODUCTION

Defendant/Appellant ZIMMERN BEHARRY, will be referred to as he stands before this Court, as he stood before the trial court, and by name. Appellee, the UNITED STATES OF AMERICA, will be referred to as the government.

At the time this brief was finalized, undersigned counsel had not yet received an index to the record prepared by the district court. Therefore, the record volume numbers were not available for citation. Pursuant to 11th Cir. R. 28-4, citation to the record will be to the district court document number and page number.

Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE ISSUES

I. WHETHER MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND REASONABLE DOUBT.

II. WHETHER THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

III. WHETHER THE GOVERNMENT'S PATTERN OF MISCONDUCT SEVERELY PREJUDICED MR. BEHARRY AND REQUIRES DISMISSAL OF THE INDICTMENT OR AT LEAST A NEW TRIAL.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment and sentence based on a jury verdict finding Zimmern Beharry guilty of possession and importation of cocaine. (R-514; R-549; R.E. 4). Although the government charged Mr. Beharry with participating in a broader conspiracy to possess and import cocaine, the jury hung on those counts and convicted him only of involvement in two specific importations occurring on February 2 and February 10, 1994. Perhaps the most troubling aspect of this case, however, are the deliberate misrepresentations and omissions by the government throughout this prosecution. Mr. Beharry is currently serving a sentence of life in prison.

Statement of the Case. Mr. Beharry was initially indicted on ten counts of conspiracy to possess and import cocaine into the United States. See (R-147; R-179; R.E. 2). After the grand jury handed down the

indictment, the government sought Mr. Beharry's extradition from Trinidad and Tobago. See (R-529).

The court in Trinidad did not simply rubber-stamp the United States' extradition request. Of the ten counts in Mr. Beharry's indictment, the court in Trinidad refused to extradite on counts nine and ten, finding insufficient evidence to support those counts. See (R-272, 277; R.E. 3).

This case proceeded to trial in October 1999 in the Southern District of Florida on six counts: conspiracy to import cocaine into the United States from September 1, 1993 to February 10, 1994; importation of cocaine on February 2, 1994; importation of cocaine on February 10, 1994; conspiracy to possess cocaine from September 1, 1993 to February 10, 1994; possession of cocaine on February 2, 1994; possession of cocaine on February 10, 1994. See (R-579). None of these charges alleges specific quantities of cocaine. See (R-179).

On Friday, after several days of deliberations, the district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810).

The district judge spoke to Juror 8, Carol Best, out of the presence of the other jurors. (R-585-2832). She was very upset and crying. See (R-585-2833, 2836). When the district court questioned Ms. Best, she expressed her fear for her physical safety. (R-585-2834-36). Although to that point only loud and foul

language had been used, Juror Best believed the argument "could move to something more physical." (R-585-2834-36).

The district court decided to adjourn until Monday, hoping the weekend would cool things down. See (R-585-2838). Before releasing the jurors for the weekend, the judge cautioned them to remain civil to each other during deliberations. (R-585-2840).

The jury continued deliberations on Monday. (R-586) The court then received a note that said "we are unanimous on Count 5, we are hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous."[1] (R-586-2846). Over defense objection that it would be unduly coercive and single out Juror Best, the district court gave the jury a modified Allen charge. (R-586-2856-57). The district court denied the defense motion for mistrial. (R-586-2867).

The jury returned a verdict later that same day finding Mr. Beharry guilty of the counts that charged importation and possession of cocaine on two specific dates: February 2 and February 10, 1994. (R-514; R-586-2871). The jury hung on the two conspiracy counts. (R-514; R-596-2871). The district court denied Mr. Beharry's post-trial motions to dismiss, for repatriation, for judgment of acquittal and for a new trial. (R-538). Mr. Beharry was sentenced under the

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[1]Note that the "counts" as listed on the verdict are not numbered the same as the counts in the Fifth Superceding Indictment. Compare (R-179) with (R-514).

Guidelines to life in prison.[2] (R-549). This appeal followed. (R-552).

The trial. Through the testimony of government agents and numerous cooperating witnesses, the government sought to prove that Mr. Beharry was part of a broad conspiracy to import cocaine from Trinidad and Tobago. The government's witnesses testified about several alleged importations involving Mr. Beharry, some of which were outside the scope of the indictment and were admitted under Federal Rule of Evidence 404(b). See (R-572-398; R-573-522; R-574-756; R-575-1158; R-576-1314; R-577-1502). The government's evidence also included tape-recorded conversations, allegedly between Mr. Beharry and the Trinidadian police. See (R-576-1296, 1299; R-578-1862). In these tapes, a man alleged to be Mr. Beharry, told the police that he exported drugs to the United States.[3] See, e.g., (R-576-1229, 1231, 1309; R-578-1862). Despite this evidence, however, the jury did not convict Mr. Beharry of the broader conspiracy counts, but only of possessing and importing cocaine on two

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[2]The remaining counts of the indictment were dismissed. (R-549, 554).

[3]Facts relating to testimony of Trinidadian Officer McAlpin to a similar statement allegedly made by Mr. Beharry during a traffic stop in 1992 and not disclosed to the defense prior to trial will be addressed in the argument portion of the brief.

specific occasions: February 2nd and February 10th, 1994.

The testimony regarding these two importations came primarily from cooperating government witnesses David Nash and Wade Lalla,[4] and DEA agent Duffy. Nash and Lalla testified that they met with Mr. Beharry in Trinidad in early 1994. (R-576-1327; R-571-1516). According to Nash, Mr. Beharry told him that Lalla and a man he just knew as Carlos would be participating in a drug operation in Miami, Florida. (R-576-1327, 1474). Mr. Beharry gave Nash half of a dollar bill to use as identification. See (R-576-1329; R-577-1517). Lalla never saw Zimmern Beharry personally deliver cocaine. See (R-577-1556).

Lalla flew to Miami from Trinidad on January 31, 1994. (R-577-1522). Nash also flew to Miami and checked into a hotel where he was contacted by Lalla and Carlos. (R-576-1329-30; R-577-1553). They were having trouble collecting the money to give to the couriers for the drugs, so they called a man in New York named Ronny Rampresad and he flew down with the money. (R-576-1330; R-577-1553).

On February 2, 1994, Nash, Lalla, and Carlos went to the docks at Port Everglades to greet the ship "Hyber Intrepid" from Trinidad. (R-576-1330; R-577-1525). According to Nash, they were to pick up 30 kilograms of cocaine from the couriers, only 20 kilos of which

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[4]Lalla and Nash also testified about other importations they participated in, allegedly for Mr. Beharry. (R-576-1316-26; R-577-1505-15).

were Mr. Beharry's. (R-576-1331); see also (R-577-1524). Nash went to the docks in a taxicab. (R-576-1332). Lalla and Carlos went separately in another vehicle. (R-577-1526). Nash had the cab wait while he went on board the ship, went to the couriers' cabin, showed them his half-dollar, and paid the money. (R-576-1332). One of the couriers collected the drugs and put it in the taxicab. (R-576-1333). Nash was arrested when he went back to the cab. (R-576-1333).

Lalla and Carlos watched Nash approach the vessel. (R-577-1526). According to Lalla, he was on his cellular phone reporting to Mr. Beharry the whole time. (R-577-1526). He saw Nash being arrested and told Mr. Beharry. (R-577-1526). According to Nash, Mr. Beharry told them to leave the area and lie low for a while so they could retrieve the second shipment. (R-577-1528). In that shipment, the drugs were loaded into containers and placed on a ship in Trinidad. (R-577-1519). The containers were to be off-loaded in Miami and taken to a bonded warehouse. (R-577-1519).

Lalla testified that Mr. Beharry told him to retrieve the drugs from a man named Chris Beecham. (R-577-1528-30). Lalla took a taxicab to Beecham's house. (R-577-1531). Lalla carried a duffle bag with him. (R-577-1531). Beecham did not want to put the drugs into the duffle bag with the taxicab waiting, so Lalla went back to the hotel and returned with his rental car. (R-577-1531). When he returned, he put the duffle bag with the drugs in his car. (R-577-1533). Lalla was intercepted and arrested while driving away from Beecham's house. (R-577-1535). Thirty-six kilograms

of cocaine were seized from Lalla's car. (R-578-1747).

Defense counsel sought production of David Nash's passport, which Nash had turned over to the government. (R-576-1389, 1397; R-577-1456-57). Defense counsel sought production of the passport because by showing where and when Nash actually traveled, it would show that events did not happen when or as Nash testified. See (R-576-1389-92). The district court ordered that it be turned over to the defense. (R-576-1391; R.E. 7-2). The government never produced it. See (R-577-1397; R-530-14).

Lalla was placed in the federal witness protection program. (R-577-1539). In addition to funds he was given as part of that program, he received money from the DEA. (R-577-1560, 1604, 1610). He was also reimbursed for living expenses. (R-578-1663-64). However, according to a DEA receipt, Lalla was also paid $5,000 cash in exchange for "securing the indictment" of Zimmern Beharry. See (R-534; R-577-1607; R.E. 8).

DEA Agent Edward Duffy also testified about the events leading up to the arrest of Wade Lalla. (R-578-1737). According to Duffy, when Lalla returned to Beecham's house in the rental car, he was followed by a white van. (R-578-1814). When Lalla was arrested, the white van was neither stopped nor followed. (R-578-1815). Initially, because of DEA policy, Duffy refused to testify about why he ordered that the white van not be stopped. (R-578-1818). He only continued after being instructed to do so by the court. (R-578-1818-19). Then, for the first time, Agent Duffy testified that the

person in the white van, one of whom had been with Lalla at the dock at Port Everglades, was a confidential source by the name of Carlos Manickchand. (R-578-1820-22).

This testimony was significant because Agent Duffy's testimony before the grand jury and in the separate trial of co-defendant Ronald Rampresad, and the affidavits of DEA Agents Duffy and Mancini, and AUSA Boma, all of which were included with the extradition request to Trinidad, contained the same statement made under oath: With Wade Lalla during the February 1994 importations was an unidentified, unknown male co-conspirator, later identified as "Carlos Manaracha," who was a fugitive and who was being sought for arrest. (R-533-Exh.E, Exh.F, Exh.G, Exh.H; R-578-1835). Duffy told the grand jury that this allegedly unknown co-conspirator was not pursued because the agents lacked the manpower at the time. (R-578-1840-43). He also stated that the people who cooperated on arrest, such as Lalla, had identified the "unknown" man as Carlos Manaracha. (R-578-1831). Agent Mancini and AUSA Boma gave similar statements under oath in their affidavits to the court in Trinidad. These statements conveyed the idea that there was an unknown fugitive co-conspirator involved with Mr. Beharry, and inferred that Mr. Beharry was involved in hiding this person and continuing to deal narcotics with this co-conspirator.

On cross-examination at trial, however, it finally came to light that not only was there no such person as Carlos Manaracha, in fact Duffy knew all long that the

man with Lalla was actually Carlos Manickchand, a government informant. (R-578-1827). Moreover, when Lalla was recalled to the stand during trial, he testified that he always knew the man's name was Manickchand, and never told the government authorities otherwise. (R-581-2369). AUSA Boma was also aware of the identity of this man at the time of his affidavit and that he was an informant, not a fugitive. (R-578-1836).

Inexplicably, Duffy continued to insist that this testimony was truthful, because he was making statements about a fictitious Carlos Manaracha, not Carlos Manickchand. (R-578-1830). Duffy also testified that without a court order, to protect his informant he would have continued to maintain that the man with Lalla was Carlos Manaracha, a fugitive. (R-578-1818-19). Significantly, AUSA Reinhart recognized that without the court's order, Duffy would not be answering "truthfully." (R-578-1819).

The government never disclosed the identity of this man to the defense before trial. See (R-529; R-578-1818-19). Even after the government disclosed that there was a confidential informant involved, the government never indicated that the confidential informant was the alleged fugitive co-conspirator with Lalla in February 1994 as discussed in the affidavits, even though that fact was known by both the DEA agents and AUSA Boma. See (R-578-1827, 1836).

The defense moved for judgment of acquittal at the close of the government's case. (R-580-2339). The defense also moved to dismiss the indictment on the grounds that it was purchased with the payment of

money to Wade Lalla and the use of perjured testimony of Agent Duffy. (R-580-2343). The defense also moved to suppress Lalla's testimony because of the payment and for a mistrial. (R-580-2343). The defense renewed its motions at the close of all evidence and post-trial. (R-581-2431; R-529; R-530). All these motions were denied. (R-581-2433; R-538).

Sentencing. In determining the quantity of drugs used to obtain the base offense level for sentencing, the district court, over objection, looked not only at the cocaine allegedly involved in the importations of February 2 and 10, 1994, but went beyond that and attributed to Mr. Beharry as part of the offense conduct large drug quantities from other alleged importations. (R-545; R-546; R-587). Some of the additional cocaine would have been part of the alleged conspiracy on which the jury could not reach a verdict. See (R-587-2884-2979). Some of it came from alleged importations that were even outside the time period of the alleged conspiracies. See (R-587-2884-2979). Most of the evidence used to support the drug quantity came from the testimony of cooperating government witnesses. See (R-587-2884-2979). The total assigned to Mr. Beharry was therefore over 150 kilograms, making his base offense level 38. (R-587-3038). The district court found this drug quantity by a preponderance of the evidence. (R-587-2957-58).[5]

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[5]Defense counsel objected to the sources of information used to support the drug quantity assessment, the standard of proof, and the amount itself. See (R-545; R-546; R-557; R-587-

The district court over objection, enhanced Mr. Beharry's sentence by four levels for his role in the offense and two levels for possession of a firearm. (R-587-2999, 3009; R-549). As a result, Mr. Beharry was assigned the highest level, 43, and sentenced to life in prison. (R-549).

STANDARD OF REVIEW

This Court's review of a district court's decision to give an Allen charge is limited to evaluating the coercive impact of the charge. United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989).

Review of an extradition order presents legal questions concerning interpretation of a treaty and is subject to plenary review. United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995).

Denial of a motion to dismiss an indictment is reviewed for an abusive discretion. See United States v. Pielago, 135 F.3d 703, (11th Cir. 1998).

This Court will reverse because of discovery violation where it resulted in substantial prejudice. United Sttes v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995).

Denial of a motion for new trial is reviewed for abuse of discretion. United States v. Pistone, 177 F.3d 957 (11th Cir. 1999).

2947). Although ruling that a preponderance of the evidence was the current standard, the court indicated the evidence would also meet a clear and convincing evidence standard. (R-587-2958).

SUMMARY OF THE ARGUMENT

This is an appeal from a judgment and sentence based on a jury verdict finding Zimmern Beharry guilty of possession and importation cocaine under 21 U.S.C. §§ 841 & 952. This case presents this Court with perhaps its first opportunity to address the application of the United States Supreme Court's recent decisions in Apprendi v. New Jersey and United States v. Castillo to the federal drug laws and Sentencing Guidelines. In this case, the indictment did not charge, nor did the jury find, any specific amount of drugs attributable to Mr. Beharry. During sentencing, the district court, over objection, determined drug quantity by a preponderance of the evidence. Because drug quantity is the single most important factor determining the penalty under both §841, §960, and the Sentencing Guidelines, it must be determined by a jury beyond a reasonable doubt. Mr. Beharry's conviction and sentence violate his Fifth and Sixth Amendment rights and he is entitled to a new trial.

Moreover, giving of the modified Allen charge in this case was unduly coercive. Speaking to the judge outside the presence of the other jurors, one juror expressed fear for her physical safety because of the level of hostility in the jury room. Under these circumstances, giving of an Allen charge was reversible error.

Perhaps the most troubling aspect of this case, however, are the deliberate misrepresentations and omissions by the government throughout this prosecution. Government agents lied under oath to

obtain Mr. Beharry's indictment and extradition and paid government witness Wade Lalla to secure the indictment. The government also failed to disclose a statement Mr. Beharry allegedly made to a Trinidadian police officer, misled the district court about when the prosecution had learned of that statement, and lost the passport requested to impeach another significant government witness. This Court should dismiss Mr. Beharry's indictment and repatriate him to Trinidad. At the least, this government misconduct requires a new trial.

ARGUMENT

I. MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND A REASONABLE DOUBT.

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to Mr. Beharry. (R-179; R-514, R.E. 2). Nonetheless, during sentencing, the district court attributed to Mr. Beharry amounts from numerous alleged importations, most of which were even outside the time period for the two possessions and importations for which he was convicted. (R-587-2884-2979). Over objection, the district court made that determination by a preponderance of the evidence. (R-587-2957-58). As a result, Mr. Beharry was sentenced to life. (R-549). Under the United States Supreme Court's recent decisions in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and United States v. Castillo, 120 S.Ct. 2090

(2000), this was error. Drug quantity should be considered an element of the offense in §§841, 952 and 960. This Court should reverse and remand for a new trial.[6]

Historically, every fact that determined punishment was considered an element of the offense. See Apprendi, 120 S.Ct. at 2368-78 (Thomas, J. Concurring). Every element of a crime must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). However, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Court, addressing a Pennsylvania firearm enhancement, ruled that there were some facts, termed "sentencing factors," that need not be found by a jury or beyond a reasonable doubt, but that could be used to determine the applicable sentence. The Court in McMillan and its progeny looked to legislative intent to determine whether the legislature intended a factor to be an element of the offense or merely a consideration in determining

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[6]As this case was tried pre-Apprendi, and following this Court's precedent, defense counsel did not request that the jury be permitted to determine drug quantity. However, defense counsel did object to the trial court's determining drug quantity by only a preponderance of the evidence. (R-587-2957). However, given the magnitude of this constitutional error, Mr. Beharry would be entitled to relief even under a plain error standard. See United States v. Walker, 59 F.3d 1196 (11th Cir.1995)(court would find plain error because of subsequent decision of the Supreme Court).

sentence. See id. at 86-88; see also Almendarez-Torres v. United States, 523 U.S. 224 (1998)(recidivism statute).

In Apprendi, the Supreme Court signaled a return to the original conception of what constitute elements of a crime. In that case, the defendant fired several shots into the home of an African-American family that had recently moved into that neighborhood. 120 S.Ct. at 2351. He pled guilty to two counts of possession of a firearm for an unlawful purpose. Under New Jersey law, that crime carried a penalty of 5 and 10 years' imprisonment. Id. at 2352. A separate New Jersey statute allowed the court to sentence a defendant to up to 20 years' imprisonment if the defendant acted with racial bias in committing the crime. Id. Finding by a preponderance of the evidence that Apprendi acted with racial bias, the court sentenced him to 12 years' imprisonment.

The Supreme Court ruled this New Jersey sentencing scheme unconstitutional because it violated due process and the right to trial by jury. Id. In so doing, the Court severely limited both McMillan and Almendarez-Torres: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Therefore, a jury had to find beyond a reasonable doubt that the defendant acted with racial bias in order to enhance his sentence on that basis. Id. at 2363.

The issue in this case is how Apprendi affects the

federal sentencing scheme for drug offenses. Mr. Beharry was convicted of possession and importation of cocaine in violation of 21 U.S.C. §§ 841 and 952. (R-549). Although the statutory provisions for possession are all contained in § 841, whereas they are split into two statutes for importation, 21 U.S.C. §§952 & 960, the sentencing provisions are virtually identical. Indeed, they share the same provision of the Sentencing Guidelines. U.S.S.G. §2D1.1.

Subsection 841(a), entitled "Unlawful Acts," provides generally that it is unlawful to knowingly possess a controlled substance with intent to distribute. Subsection 841(b), entitled "Penalties," provides for different penalty ranges depending on the type and quantity of drugs involved. Under §841(b)(1)(A)(ii), a conviction for possession of 5 or more kilograms of cocaine carries a sentence of not less than 10 years' imprisonment and not more than life.

Similarly, §952 makes it unlawful to import a controlled substance into the United States. Then §960(a), entitled "Unlawful acts," states that any person who "knowingly or intentionally" imports controlled substances into the United States as stated in §952 shall be punished as set forth in subsection (b), the "Penalties" section. Subsection 960(b) is structured almost identically to §841(b). As in §841(b), under §960(b)(1)(B) a conviction for importation of more than 5 kilograms of cocaine carries a sentence of imprisonment for "not less than 10 years and not more than life." Both §841 and §960 provide lesser penalties for lower quantities of cocaine. Subsection

841(b)(1)(C) and §960(b)(3) also provide for imprisonment of "not more than 20 years" for possession of a controlled substance not covered by the other portions of those statutes.

Given such a broad sentencing range of 10 years to life, the Sentencing Guidelines are what primarily determine the defendant's sentence. The Drug Quantity Table in U.S.S.G. §2D1.1(c), which applies to both §841 and §§952 and 960, provides different base offense levels for different quantities of cocaine. The difference in the base offense level can be as great as less than a year imprisonment for less than 25 grams of cocaine (level 12), to 293 months imprisonment for over 150 kilograms of cocaine (level 38). U.S.S.G. §2D1.1(c).

Despite the fact that drug quantity is the single most important factor in determining a defendant's sentence under the federal drug laws, until now the courts have uniformly held that the judge, not the jury determines drug quantity, and that drug quantity need only be proven by a preponderance of the evidence. See, e.g. United States v. Williams, 876 F.2d 1521 (11th Cir. 1990). These courts have generally reasoned that placing references to drug quantity in the subsection entitled "penalties" indicates that drug quantity is a sentencing factor, rather than an element. See id. at 1525. Courts have interpreted §960 the same way. United States v. Jinadu, 98 F.3d 239, 248-29 (6th Cir. 1996). With Apprendi, the Supreme Court has signaled that this must change.

Although Apprendi involved a hate crimes

statute, the Supreme Court has already indicated that Apprendi also applies to §841. In Jones v. United States, 120 S.Ct. 2739 (2000)(Jones II), the Court vacated a conviction under §841, and remanded to the Tenth Circuit for reconsideration in light of Apprendi.

In Jones II, the Tenth Circuit had considered whether the Supreme Court's opinion in a different Jones v. United States, 526 U.S. 227 (1999)(Jones I), which foreshadowed Apprendi, made the quantity provisions of §841(b)(1) elements of the crime instead of "sentencing factors." 194 F.2d 1178 (10th Cir. 1999). In Jones I, the Supreme Court ruled that the provisions for increased penalties in the federal car jacking statute, 18 U.S.C. §2119, where the offense involves serious bodily injury of death, were elements of the offense rather than sentencing factors. The Court stated in dicta that "under the Due Process Clause of the Fifth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones I, 526 U.S. at 243 n.6.

The Tenth Circuit in Jones II noted that Jones I "opens the door to the question of whether §841's unambiguous classification of quantity as a sentencing factor violates the Fifth and Sixth Amendments." 194 F.3d at 1186. Nonetheless, the Tenth Circuit adhered to its prior precedent and ruled that provisions of §841 for enhanced penalties depending on drug quantity were sentencing factors, not elements of the offense. Id. This Circuit is in accord. See United States v. Hester,

199 F.3d 1287, 1291-92 (11th Cir. 2000).

However, with the Supreme Court's vacating of the Tenth Circuit's decision in Jones II, there can be no serious question of whether Apprendi applies with equal force to §841 and the materially indistinguishable provisions of §§952 and 960. Although the Eight Circuit has rejected application of Apprendi to §841, it failed to recognize the Supreme Court's more recent decision in Jones II, which came out only a few weeks before. See United States v. Aguayo-Delgado, 2000 WL 988128 (8th Cir. 2000); United States v. Sheppard, 2000 WL 988127 (8th Cir. 2000).

Indeed, the rationale and sweeping language of Apprendi apply with equal force to the federal narcotics laws such as §§841, 952 and 960. In a very recent decision applying Apprendi to §841, a West Virginia district court noted that the rationale used in Jones I simply cannot survive Apprendi:

> Apprendi rejects attaching any significance to the separation of the "Penalties" in section 841(b) from the "Unlawful Acts" in section 841(a), which courts relied on heavily in holding that a drug amount is a sentencing factor. In light of Apprendi, this separation is nothing more than an artificial formalism.

United States v. Henderson, 2000 WL 1006054, *13 (S.D.W.Va. 2000)(citation omitted). Under the rationale of Apprendi, "Congress cannot curtail due process and Sixth Amendment rights by simply placing artificial labels on statutory aggravating facts." Id. at *15. Indeed, the Court's opinion in Apprendi is clear on this point: "[T]he relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365.

The Eighth Circuit focused on the fact that Apprendi specifically addressed only a situation where the additional facts raised the defendant's sentence above the **statutory** maximum and did not address the federal Sentencing Guidelines. See Aguayo-Delgado, 2000 WL 988128 at *5; see also Apprendi, 120 S.Ct. at 2366 (noting that the federal Sentencing Guidelines were not before the Court at that time). Under the federal sentencing scheme for drug offenses, §§841 and 960 place the statutory maximum penalties at life for most drug quantities, and leave it up to the Sentencing Guidelines to parcel out sentencing ranges within that limit.

However, although the Sentencing Guidelines divide the offense into more sentencing categories based on drug quantity than the statutes, the statutes themselves also rely on drug quantity to determine sentencing limits. Not all drug quantities carry a statutory maximum sentence of life in prison. See 21 U.S.C. §841(b)(1)(B)(40 years for 500 grams or more of cocaine); id. §960(b)(2)(Same); id. §841(b)(1)(C)(20

years for any offense not covered by the other provisions--which would include less than 500 grams of cocaine); id. §960(b)(3)(same). Moreover, each of these different statutory categories carries a different felony grade. See 18 U.S.C. §3559 (defining felony grades); Henderson, 2000 WL 1006054 at *11.

This statutory scheme is similar to the firearms statute, 18 U.S.C. §924(c), recently construed by the Supreme Court in United States v. Castillo, 120 S.Ct. 2090 (2000). That statute provided for different penalties for using a firearm during a crime of violence depending on the type of firearm. Id. at 2091-92. The title of §924 is "Penalties," and the categories are introduced with the phrase "shall . . . be sentenced to," which separates it from the rest of the section. Nonetheless, the Supreme Court construed the language of that statute to mean that the type of firearm was an element of the offense that had to be determined by the jury beyond a reasonable doubt. Id. at 2092. Because of that interpretation, the Court did not need to reach the constitutional question. See id.

Similarly, §841(b) and §960(b) provide different penalties depending on the type and amount of drugs involved. As in Castillo, this Court should interpret these provisions to provide elements, not sentencing factors, and thereby avoid the necessity of invalidating the statutes on constitutional grounds.

Second, the reasoning underlying Apprendi is that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal

defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 120 S.Ct. at 2363 (citation omitted).

Drug quantity is a factor that increases the penalty greatly under both the statutes and the Sentencing Guidelines. Indeed, it is the most significant factor in sentencing. Moreover, within the broad statutory range of 10 years to life, the Guidelines can more than double the penalty depending on drug quantity. As the Court noted in Apprendi:

> [I]t can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.

Id. at 2363.

In her dissent, Justice O'Connor recognized that this reasoning would apply equally to sentencing schemes like the federal Sentencing Guidelines:

> The actual principle underlying the court's decision may be that any fact (other than prior conviction) that has the

> effect, *in real terms*, of increasing the maximum punishment beyond a otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines).

Id. at 2391 (O'Connor, J., dissenting). The Court's later decision in Jones II, remanding for reconsideration in light of Apprendi, appears to validate her reading of Apprendi. The majority's adamant refusal to address the effect of its decision on the federal Sentencing Guidelines, see id. at 2366 n.21, thus appears to reflect a desire to address only the case at bar, and is not a sign

that the majority would not apply the same rationale to the federal sentencing scheme.

Furthermore, as Justice Thomas points out in his concurring opinion, the federal Sentencing Guidelines "'have the force and effect of laws.'". 120 S.Ct. at 2380 n.11 (Thomas, J., concurring)(citation omitted). They are approved by Congress--as are statutes, although the procedure is different. See 28 U.S.C. §994(p)-(r).

It would undercut the entire rationale of Apprendi if the determination of what facts are elements of the crime depended on whether Congress placed that fact in the statute or in the Sentencing Guidelines. Under Apprendi, it is the **real effect** of the fact that matters, not a legislature's label--whether that label is "penalties" or "sentencing guidelines." Allowing criteria that substantially increase the penalty for an offense to be determined by a judge under a lesser standard simply because it is in the "guidelines" and not the "statute," would be as meaninglessly formalistic as the sentencing schemes rejected by the Supreme Court in Castillo and Apprendi. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" 120 S.Ct. at 2365 (quoting McMillan, 477 U.S. At 88). Therefore, the determination of drug quantity under 21 U.S.C. §952 and §§ 841 and 960 and the federal Sentencing Guidelines must be made by a jury and proven beyond a reasonable doubt. To the extent the

federal sentencing scheme provides that the judge makes the determination by a preponderance of the evidence it violates the Fifth and Sixth Amendments.[7]

In this case, the indictment did not allege, and the jury did not find, any drug quantity. Indeed, this case is a good example of why the jury, not the judge, should determine drug quantity. Not only did the district court determine drug quantity, but the court attributed to Mr. Beharry large quantities of drugs beyond those of the two events for which he was convicted. Some of those additional drugs were alleged to be part of the broader conspiracy on which the jury could not reach a verdict, and some were from alleged importations outside the time period of the conspiracy. In so doing, the court relied on the same testimony that failed to convince the jury to find Mr. Beharry guilty of conspiracy beyond a reasonable doubt. Without a jury determination, there is simply no basis for the court to determine which statutory category, let alone Sentencing Guidelines category, to apply.

Mr. Beharry's indictment, conviction and sentence are in violation of his Fifth and Sixth Amendment rights. This Court should reverse and remand for a new trial in which all of the elements are decided by the jury by proof beyond a reasonable

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[7]As they also increase the penalty significantly, the sentencing enhancements for possession of a firearm and role in the offense should also e considered elements and should have been determined by the jury here.

doubt.[8]

II. THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

On Friday, after several days of deliberations, the trial court received a note that Juror 8 did not feel safe in the jury room and requested the presence of the bailiff. Speaking to the judge outside the presence of the other jurors, this juror expressed concern for her physical safety because of the level of hostility in the jury room. Nonetheless, the district court, over defense objection, gave a modified Allen charge. Under the circumstances, that charge was unduly coercive. This case must be reversed and remanded for a new trial.

Giving an Allen charge is error when it has the effect of coercing the jury. See United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989). Although this Court has approved use of a modified Allen charge in most circumstances, this case presents perhaps the best example of when giving of that charge will have an unduly coercive impact on the jury--where the

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[8]At a minimum, this Court should reverse and remand for resentencing to not more than 20 years under §841(b)(1)(C) and §960(b)(3). See Henderson, 2000 WL 1006054.

dissenting juror has made the court aware that she fears for her physical safety in the jury room.

First, it is well-recognized that the impact of an Allen charge is more coercive when the court is aware of the nature and extent of the jury's division. When the court is aware of the identity of the dissenting jurors, those jurors would naturally perceive an Allen charge as focused directly at them. See United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984). For this reason, polling the jurors to determine how the jury stands is per se error. See United States v. Spitz, 696 F.2d 916 (11th Cir. 1983)(quoting Brasfield v. United States, 272 U.S. 448 (1926)). However, under some circumstances, the mere disclosure to the judge of the jury's numerical division before giving an Allen charge has been found coercive. Sae-Chua, 725 F.2d at 532; Williams v. United States, 338 F.2d 530, 532-33 (D.C.Cir. 1964).

For example, in Sae-Chua, the judge knew the numerical breakdown of the jury and the identity of the dissenter. 725 F.2d at 532. More importantly, "[t]he dissenting juror was aware of the fact that the judge possessed this knowledge." Id. The judge nonetheless gave a modified Allen charge over objection. The court reversed and remanded for a new trial:

> Under these circumstances the charge could only be read by the dissenting juror as being leveled at him. He could hardly escape reasoning that the judge was

> not likely to believe that he could persuade the opposing eleven to adopt his position . . . and that he, individually, was being urged by the judge to reconsider his vote. We hold that the giving of the charge under these circumstances was coercive and constituted reversible error.

Id.

In this case, although the judge did not poll the jury before giving the Allen charge, the effect was the same because the judge knew the identity of the dissenting juror. Moreover, as in Sae-Chua, that juror knew the judge had that knowledge. She would naturally feel that the judge's comments were directed specifically at her. Added to this, however, is the fact that the judge gave the charge even though the dissenting juror had told the judge that she feared for her physical safety in the jury room.

Jury deliberations in this case began on Wednesday. On that Friday, the district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810).

The judge spoke to Juror 8, Carol Best, out of

the presence of the other jurors. (R-585-2832). She was very upset and crying. See (R-585-2833, 2836). Being careful not to intrude upon the discussions and thought process of the jury, the judge questioned Ms. Best about the basis for her fear. She expressed concern for her physical safety:

> THE COURT: Now I want to ask you, do you feel or do you have a concern for your physical safety?
>
> **MS. BEST: At certain moments in there, yes.**
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> THE COURT: Are we taking about the level of the discussion, or the civility in the discussion?
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> MS. BEST: Civility in the discussion.
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> THE COURT: Civility?
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> MS. BEST: Yes, sir.
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> THE COURT: Is there anything else with regard to your safety that you wanted to mention to me?
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> MS. BEST: Well, in the jury room when people are expressing opinions--
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> * * *

MS. BEST: When I am being spoken to regarding statements that I have made which may be contrary to what other jurors feel, the voice is raised to a very high level. The comments are directed exactly to me, I am commended, even if I am looking at a piece of paper, to stop and look directly at whoever.

THE COURT: Okay. I want to stop there. I hear what you are saying, and so it is a question, really, of the tone and just the issues of civility in the room, do you feel? Is that a general description?

MS. BEST: That is **part** of it, yes.

THE COURT: Is there anything else that I need to be aware of?

MS. BEST: Well, I haven't been struck.

THE COURT: But are you in fear that could happen?

MS. BEST: I think the conversations, tones, and level of the voice, I am not a young woman and I have been around a long time, I have no fear, I live alone. I go in my back yard with a baseball bat when I hear a noise, and so I am not -- and I very rarely cry, **but I think that that could move to something more physical,** foul

language has been used. I don't want off the jury.

(R-585-2834-36).

The judge decided to adjourn until Monday, hoping the weekend would cool things down. See (R-585-2838). Before releasing them for the weekend, the judge cautioned them to remain civil to each other during deliberations. (R-585-2840).

The jury continued deliberations on Monday. (R-586) The court then received a note that said "we are unanimous on Count 5, we are hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." (R-586-2846). Over defense objection that it would be unduly coercive and single out Juror 8, the judge gave the jury a modified Allen charge. (R-586-2856-57). The district court denied the defense motion for mistrial. (R-586-2867). The jury returned a verdict later that same day finding Mr. Beharry guilty on Counts 2, 3, 5, and 6, and hung on the others. (R-586-2871; R-514).

The circumstances clearly indicated that Juror Best was disagreeing with the rest of the jurors and that her refusal to go with the pack was making the others hostile. Indeed, the hostility was so great that Juror Best felt compelled to notify the court and request the presence of the bailiff. This tough, independent lady was visibly upset and crying, even though she stated that she rarely cried.

Although the judge chose to characterize her concerns as being about "civility," Ms. Best made it clear that was only "part" of it. She expressly, and

repeatedly, stated that she had concerns for her physical safety. Given the level of hostility, she felt that the deliberations could turn violent. Yet despite these clear statements about her fear, the district court inexplicably stated that "the issue is not one of physical safety" in justifying giving the charge on Monday. (R-586-2851). After giving that charge, the jury which had struggled for days to reach a verdict on one count returned a verdict on three more counts in a matter of hours. The impact of this charge is clear.

As Judge Edmondson noted in United States v. Rey, 811 F.2d 1453 (11th Cir. 1987), an Allen charge is by its nature coercive and intimidating.

> The last thing such a minority holdout juror needs is for the trial judge--cloaked with the full authority of his office--to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider.

811 F.2d at 1460. Where the judge knew the identity of the dissenting juror and that juror had expressed to the court her concerns about her physical safety, the effect--and incentive to give in--is even greater. In that context, holding out would not only be futile, but potentially dangerous.

Under these circumstances, giving an Allen charge was inherently and unduly coercive. This case

must be reversed and remanded for a new trial.

III. THE GOVERNMENT ENGAGED IN A PATTERN OF MISCONDUCT THAT SUBSTANTIALLY PREJUDICED MR. BEHARRY.

A very disturbing aspect of this case is the pattern of governmental misconduct at all stages of this prosecution. Government agents lied under oath to obtain Mr. Beharry's indictment and extradition and paid government witness Wade Lalla to secure the indictment. The government also failed to disclose a statement allegedly made by Mr. Beharry to a Trinidadian police officer, misled the district court about when the prosecution had learned of that statement, and lost the passport requested to impeach another significant government witness. This misconduct substantially prejudiced Mr. Beharry. The district court denied Mr. Beharry's motions for mistrial, to dismiss, and for a new trial. Mr. Beharry's conviction should be vacated, his indictment dismissed, and he should be repatriated to Trinidad. At a minimum, this requires a new trial.

A. Government agents lied to obtain Mr. Beharry's indictment and extradition from Trinidad and Tobago.

The government knowingly used false testimony to procure the indictment and then to convince the Trinidadian government to extradite Mr. Beharry. DEA

Agent Duffy's testimony before the grand jury and in the separate trial of co-defendant Ronald Rampresad, and the affidavits of DEA Agents Duffy and Mancini, and AUSA Boma, all of which were included with the extradition request to Trinidad, contained the same false statement--that an unidentified, unknown male co-conspirator who was a fugitive and who was being sought for arrest was with Wade Lalla during the February 2nd and February 10th, 1994 importations. See (R-533). This statement conveyed the idea that there was an unknown fugitive co-conspirator involved with Mr. Beharry, and inferred that Mr. Beharry was involved in hiding this person and continuing to deal narcotics with this co-conspirator.

However, during defense cross-examination at trial, Agent Duffy disclosed for the first time that the person with Wade Lalla during these importations was neither unidentified, unknown, or a fugitive, nor was he being sought for arrest. (R-578-1820-56). Instead, he was Carlos Manickchand, a confidential source known to and working undercover with the government. (R-578-1820-21). This man's identity was known from the start to the DEA agents and AUSA Boma. (R-578-1828, 1836-37).

The government never disclosed the identity of this man to the defense before trial. Even after the government disclosed that there was a confidential informant involved, the government never indicated that the confidential informant was the alleged fugitive co-conspirator with Lalla in February 1994 as discussed in the affidavits, even though that fact was known by

both the DEA agents and AUSA Boma. See (R-529; R-578-1819).

The affidavits also misleadingly stated that the man was later identified by Wade Lalla as "Carlos Manaracha." (R-533-Exh.E-H). However, when Lalla was recalled to the stand at trial, he testified that he had know Carlos for some time before 1994, that he knew his correct name was "Manickchand," and that he never told the government otherwise. (R-581-2369).

Agent Duffy's testimony at trial shows how deliberate the lie was. He claimed his statements had been technical correct because they referred to the fictitious Carlos Manaracha, not Carlos Manickchand -- even though he knew that Carlos Manickchand was actually the person with Lalla and there was no such person as Carlos Manaracha. (R-578-1830-31). Indeed, he stated that if he had not been otherwise instructed by the court, he would have continued to testify that the person with Wade Lalla was Carlos Manaracha -- simply because of DEA policy. (R-578-1831-32). After all, he had already given such testimony in the separate trial of alleged co-conspirator Rampresad. See (R-533-Exh.E). Significantly, unlike Duffy, AUSA Reinhart recognized that without the court's order Duffy would not be answering "truthfully." (R-578-1818).

Carlos Manickchand was not a co-conspirator or a fugitive--he was working for Agents Duffy and Mancini all along. (R-578-1830). This was a deliberate and calculated lie, chosen to make it seem as though there was another individual working with Mr. Beharry

who managed to get away.

These actions not only violated Mr. Beharry's due process rights, but also violated the extradition treaty between Trinidad and the United States. These deliberate misrepresentations permeated Mr. Beharry's indictment and extradition and rendered the district court's jurisdiction over Mr. Beharry invalid.

1. Lies to the grand jury. The government first used the known false testimony of Agents Duffy and Mancini and AUSA Boma to obtain the indictment against Mr. Beharry. AUSA Boma, knowing the truth about Carlos, asked Agent Duffy about the "fugitive" who got away. (R-578-1840-43). Agent Duffy explained that "the fugitive"--the man who was with Wade Lalla during the two importations in February 1994--got away because the agents were "spread too thin" during the arrests and there were insufficient officers working to go after "the fugitive" who drove off. (R-578-1840-43). Of course, AUSA Boma and Agent Duffy knew this was false -- no agent ever intended to go after the "fugitive." See (R-578-1836-37). Carlos Manickchand got away because he was working undercover with the DEA, not because the agents were spread out too thin. Agent Duffy also told the grand jury that Lalla identified the man as Carlos Manaracha. See (R-578-1841-42)(misspelled "Maharej"). That too was false. See (R-581-2369).

The knowing use of material false evidence by the government in criminal prosecutions violates due process. See Giglio v. United States, 405 U.S. 150 (1972). "'The same result obtains when the

[government], although not soliciting false evidence, allows it to go uncorrected when it appears.'" Id. (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

"Federal courts possess the power and duty to dismiss federal indictments obtained in violation of the Constitution or laws of the United States." United States v. Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983); see also Giglio, 405 U.S. 150 (federal courts have supervisory power over grand jury investigations). Although an extreme sanction, "[i]t is well settled that district courts may exercise their discretionary power to dismiss an indictment on grounds of prosecutorial misconduct where a sufficient showing of prejudice has been made." United States v. Accetturo, 858 F.2d 679 (11th Cir. 1988).

Significantly, the government's misconduct in this case was intentional, not negligent. Contrast United States v. Exharos, 135 F.3d 723 (11th Cir. 1998)(when government learned about falsified documents the prosecution refused to use them at trial). The knowing use of false testimony not only by government agents, but by the prosecutor, sets this case apart from others involving prosecutorial misconduct before the grand jury.

In United States v. Sterba, 22 F.Supp.2d 1333 (M.D.Fla. 1998), the government disclosed the existence of a confidential informant pursuant to the court's pretrial order, but refused to permit that informant to be interviewed or even to disclose the informant's name prior to trial. At trial, the government called this informant to the stand. She testified that her

name was "Gracie Greggs." A witness of that name was also listed on the government's witness list. The witness also testified that she was the confidential informant. Id. at 1338.

The defense investigated the witness during trial, based on the understanding that the witness' name was "Gracie Greggs" and found nothing. In fact, the witness' name was "Adria Jackson." Id. at 1334. That information was not discovered by defense counsel until after the government rested. Id. at 1336-37.

Once the defense could investigate Adria Jackson, a number of potentially significant facts came to light that could have seriously impeached her credibility. For example, she was paid money as part of this investigation, had pled guilty to making a false statement and filing a false police report, and had a reputation in her community as a liar. Government counsel admitted that they knew the witness would testify to a false name, but argued that she answered all other questions truthfully.

The district court granted the defense motion for mistrial and dismissed the indictment. The district court was very concerned with

> why an AUSA should decide what degree of truthfulness in testimony is deserved by the court, how an AUSA can forgive the falsification of testimony of developing a competing consideration, and how an

> agency not entitled to do so can introduce sub silentio a false name into a court proceeding without judicial knowledge or consent (assuming its availability).

Id. at 1338. All in the name of obtaining a conviction, the government "either manufactured or accepted a plan" to lie to the defense and the court to avoid any "bothersome" problems with the witness' credibility. Id. at 1340. "In short, the AUSA arrogated to herself the legal and moral authority to decide what truth became public and, thereby, what fate awaited" the defendant. Id.

In discussing the prejudice to the defendant, the court noted that the government's lie forced the defense to plan and disclose their trial strategy and evidence, while the government withheld significant information. Id. at 1342. Once the defense discovered the lie during trial, the government's actions forced the defense to move for a mistrial. Therefore, the district court ruled that not only was a mistrial necessary, but the indictment must be dismissed. Id. at 1341-43 (citing United States v. Torkington, 874 F.2d 1441 (11th Cir. 1989)(double jeopardy prohibited retrial after mistrial where prosecution's actions compelled the defendant to move for a mistrial).

In this case, the government was willing to lie to the grand jury, to the defense, and to the courts here and in Trinidad in pursuit of a conviction. The government was also willing to deceive Mr. Beharry's jury, and it

was not until Agent Duffy was cross-examined by the defense that the truth emerged. As in Sterba, the lie involved the true identity of a confidential informant.

The prejudice in this case is even greater than in Sterba because the government never called the informant to testify before the grand jury or at trial. Thus, instead of the grand jurors wondering why the government had not called its own confidential informant to testify, the grand jury was mislead into believing that the person with Lalla during the February 1994 importations was actually a co-conspirator who was not called to testify because he was a fugitive from justice. This, we now know, is not true.

Moreover, the defense was unable to investigate Carlos Manickchand or call him at trial because it was not until mid-trial that it was discovered that Manickchand was the "fugitive co-conspirator" with Lalla on February 2 and February 10, 1994. Carlos Manickchand was outside the subpoena power of the United States. Thus, the defense never had an opportunity to investigate or examine this witness who apparently was in the middle of the alleged importations for which Mr. Beharry was convicted.[9]

2. Extradition. Mr. Beharry's extradition was invalid because the government's conduct violated the extradition treaty between Trinidad and the United

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[9]The district court denied the defense request for a missing witness instruction, compounding the problem. See (R-581-2445-47).

States. "As a matter of international law . . . nations are under no legal obligation to surrender a fugitive from justice in the absence of a treaty." United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995). Thus, the terms of an extradition treaty govern the procedure and validity of an extradition. See also 18 U.S.C. § 3184.

The 1931 extradition treaty between the United States and Great Britain is applicable to Trinidad, a former British possession. See Hoi-Pong v. Noriega, 677 F.Supp. 1153 (S.D.Fla. 1988). Under this treaty, the United States had to provide "sufficient evidence" that the person sought to be extradited committed the alleged offense to obtain extradition. See Extradition Treaty Between U.S. & Great Britain of 1931, arts. 9, 11, 47 Stat. 2122.

Here, the affidavits of Agents Duffy and Mancini, and AUSA Boma, accompanied the extradition request as evidence for the court in Trinidad. See (R-533). Agent Duffy's affidavit stated that with Lalla was "Wayne LNU [last name unknown], subsequently identified as Carlos Manaracha, who remains an unindicted fugitive in this case." (R-533-Exh.G; R-578-1826); see also (R-578-1841-42). We now know, however, that these affiants intentionally lied in their statements. Indeed, Agent Duffy and AUSA Boma knew that Carlos Manickchand was with Lalla in February 1994 and that AUSA Boma knew this **before** the affidavits were submitted to Trinidad as an official U.S. request for Mr. Beharry's extradition. (R-578-1836-37). The court in Trinidad did not know this, and

thus could not accurately gauge their credibility.

The extradition process in Mr. Beharry's case was not simply a rubber-stamping of the United States' request for extradition. Mr. Beharry was indicted on ten counts, but the court in Trinidad refused to extradite on counts nine and ten, finding insufficient credible evidence to support extradition on those counts. (R-572, 277; R.E. 3). The court weighed the evidence presented during the extradition proceedings and determined whether it was credible and sufficient. Certainly, it would have been highly probative, material, and weighty for the Trinidadian court to know that Agent Duffy, Agent Mancini, and AUSA Boma -- the three American law enforcement officers representing the United States in these proceedings--all lied under oath in their affidavits. Knowing this, the court could have then determined how much weight, if any, to give to their affidavits.

"Deliberate deception of a court . . . by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio, 405 U.S. at 153. Requests for extradition must comport with fundamental tenets of international jurisprudence, principles of treaty construction, and nuances of foreign law. Knowingly filing a false affidavit is not only unethical and criminal, but also incompatible with established principles of international law. Every country that enters into an extradition treaty with the United States expects that affidavits submitted in support of an extradition request do not contain knowing, deliberate falsehoods such as the ones

contained in the affidavits in this case.

3. Appropriate Relief. Because of the government's intentional and illegal conduct, Mr. Beharry's indictment is hopelessly compromised. As in Sterba, a new trial or simple exclusion of some evidence will not adequately cure the prejudice to Mr. Beharry. Dismissal of the indictment is the only remedy that can both address the prejudice to Mr. Beharry and send the appropriate message that intentional lies will not be tolerated.

Furthermore, the appropriate remedy for violation of the extradition treaty in this case that will prevent the recurrence of such conduct is repatriation. See Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993)(vacating judgment extraditing defendant to Israel because of federal prosecutors' fraud on the court); United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) (repatriation appropriate remedy for violation of extradition treaty), vacated on other grounds, 505 U.S. 1201 (1992). Such relief would signify this Court's unwillingness to countenance deliberate deceit by its court officers in foreign courts. At the least, this conduct warrants a new trial so the defense can have an opportunity to investigate Carlos Manickchand.

B. The government purchased the indictment of Mr. Beharry by paying a government witness a reward for securing the indictment.

Mr. Beharry's indictment should also be dismissed and the extradition declared invalid because, according to the government's own voucher, Wade

Lalla was paid $5,000 for "securing the indictment" in this case. See (R-534; R-577-1607; R.E. 8). This cash reward for securing Mr. Beharry's indictment violates the federal anti-bribery statute, 18 U.S.C. § 201(c)(2) and due process.

The government's payment of a $5,000 cash reward to its main cooperating witness sets this case apart from other cases dealing with illegal procurement of the testimony of government witness. In United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999), this Court held "that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. §201(c)(2)." This Court reasoned that such agreements could not come within the plain meaning of the bribery statute, or courts and defense counsel would have raised the issue regularly during the thirty years the statute has been in effect. See id.

Significantly, this Court did not base its reasoning on an interpretation that would totally exclude federal prosecutors from the provisions of the statute, despite the fact that this was the basis for the Tenth Circuit's decision reaching the same result in United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999)(en banc reversing contrary panel opinion). Implicitly, therefore, this Court has concluded that there may be some circumstances in which the actions of government prosecutors may run afoul of 18 U.S.C. §201(c)(2).

This conclusion comports with the plain

language of the statute. 18 U.S.C. § 201(c)(2) provides that "whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of [his or her] testimony under oath" has committed bribery. "Whoever" is an extremely broad term that naturally includes government prosecutors. See 1 U.S.C. § 1 (defining "whoever" to include "individuals"); United States v. Condon, 170 F.3d 687, 689 (7th Cir. 1999)(under 1 U.S.C. § 1, "whoever" is defined to encompass federal prosecutors).

Moreover, in Nardone v. United States, 302 U.S. 379 (1937), the Supreme Court addressed whether a statute that allowed "no person" to tap phones applied to government agents. The Court ruled that the government has been excluded from coverage in such an act in only two circumstances: (1) "where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest," or (2) "where a reading which would include such officers would work an obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm." Id. at 383-84. Neither circumstance applies here.

First, unlike the long-established practice of offering leniency in exchange for testimony or other assistance, there is no "recognized or established" practice of the government offering substantial amounts of reward money in return for securing an indictment. Courts have approved paying a cooperating government witness to cover expenses and as part of participation in

the federal witness protection program. However, several circuits have recognized that the payment of money expressly for testimony, or as a "reward" for assistance in obtaining an indictment or conviction is a very different matter. See United States v. Hunte, 193 F.3d 173, 176 n.4 (3d Cir. 1999)(reserving question of §201(c)(2)'s application where witness has received money from government in exchange for testimony); Condon, 170 F.3d at 689-90 (rejecting argument that leniency in exchange for testimony violates §201(c) but declining to hold that statute does not apply to federal prosecutors because that could allow prosecutors to purchase favorable testimony). But see United States v. Albanese, 195 F.3d 389 (8th Cir. 1999).

Unlike leniency or expense money, there is no long-established statutory or historical basis for allowing prosecutors to pay cash rewards for securing an indictment. See Condon, 170 F.3d at 689. Nor is application of this statute to government lawyers in such circumstances absurd. Just the opposite. Surely, such payments have the same potential to corrupt testimony when offered by government prosecutors as when offered by defense counsel. See Albanese, 195 F.3d at 398 (Heaney, J., dissenting) ("I find no reason to believe that testimony bought and paid for by the government is somehow immune from being corrupted, either by design or otherwise").

Not only did the government violate the federal bribery statute, but it also violated Mr. Beharry's due process rights. In order to comport with due process, fee agreements with cooperating government witnesses

may be contingent on a successful investigation, but **may not** be contingent on the successful prosecution of a particular individual. See United States v. Sanchez, 790 F.2d 1561 (11th Cir. 1986).

Lalla was paid a substantial amount of money for "securing the indictment" of Mr. Beharry. To be sure, Lalla received the benefit of his cooperation when his sentence was substantially reduced to approximately 2 ½ years. See (R-577-1539). Following his sentence reduction, Lalla was admitted into the Witness Protection Program, where he was given money by the U.S. Marshal Service for moving expenses, housing, food, clothes, a car, medicine, and all other his other financial needs. (R-577-1539, 1610, 1663-64). However, the DEA also gave Lalla $5,000, not so that Lalla could buy clothes or eat, but as a reward for "securing" Mr. Beharry's indictment. See (R-577-1607).

In essence, the government purchased Wade Lalla's testimony, not only by offering him leniency and a chance to start over in the witness protection program, but with a significant cash reward over and above Lalla's expenses. This is precisely what the federal bribery statute was designed to avoid.

The district court erred in denying the defense motions without even an evidentiary hearing. See (R-538).[10] This Court should vacate Mr. Beharry's

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[10]Although the district court at first indicated it would hold an evidentiary hearing on this serious matter, (R-2349), no hearing was held.

conviction and remand with instructions to dismiss the indictment. In the alternative, Mr. Beharry should be given a new trial--without the purchased testimony of Wade Lalla.

C. The district court erred in admitting the testimony of Officer McAlpin regarding undisclosed statements of Mr. Beharry.

The government called Trinidadian Officer McAlpin to testify about a statement he allegedly overheard Mr. Beharry make in 1992. (R-575-1195). According to McAlpin, Mr. Beharry was pulled over by traffic officers in 1992, at which time McAlpin overheard Mr. Beharry state that there was no reason for the officers to harass him because he was sending his narcotics to the United States. (R-575-1209). McAlpin's testimony on this statement corroborated the testimony of cooperating government witness Marlon Hall, who previously had testified that he was with Mr. Beharry when Mr. Beharry was pulled over in 1992 and that he heard Mr. Beharry make the same statement. (R-573-589-90).

The defense moved to exclude McAlpin's testimony pursuant to Federal Rule of Criminal Procedure 16, because the government failed to disclose it prior to trial. (R-575-1199). Although Officer McAlpin was on the government's witness list, the government indicated that he was going to testify about a different matter. See (R-575-1200-02). The

government responded that it did not become aware of Mr. Beharry's 1992 statement until right before Hall testified. (R-575-1200-02).

The district court found that there had been a discovery violation because Mr. Beharry's 1992 alleged statement fell within Rule 16. (R-575-1207; R.E. 6). However, the district court ruled that suppression of McAlpin's testimony was too harsh a sanction in comparison with Mr. Beharry's prejudice resulting from the violation. (R-575-1207-08). The defense motion for mistrial was also denied. (R-580-2353-56). Thus, the defendant was left with no remedy.

On cross-examination, McAlpin testified that he told the government about the 1992 statement **before the trial started**. (R-576-1238-39). On re-direct, the government did not correct McAlpin's testimony, even though it directly conflicted with the prosecutor's representation that the government did not learn about the 1992 statement until the day Hall testified. See (R-576-1271-80).

The district court correctly ruled that the government violated Rule 16 by failing to disclose this alleged 1992 statement. The question then became what sanction was appropriate. In considering the appropriate sanction, the court should consider "(1) the reasons for the delay in complying with the discovery order; (2) whether the government acted in bad faith; (3) whether the defendant was prejudiced; and (4) the availability of alternate means to cure the prejudice." United States v. Christopher, 923 F.2d 1545, 1555 (11th Cir. 1991). A new trial is warranted where is a

violation of the defendant's substantial rights. United States v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995).

Here, we have no idea why the government failed to comply with Rule 16. The government represented to the district court that the reason was that it only learned of the statement after trial had commenced, when Hall testified. When the government itself only becomes aware of the evidence after the start of trial, sanctions are generally not warranted. See United States v. Panzar, 418 F.2d 1239 (5th Cir. 1969).[11] However, McAlpin testified under oath that this was simply not true.

This Court has condemned the tactic of "carelessly or by design" hiding a statement by the defendant "only to spring it in the middle of a trial." United States v. Martinez, 763 F.2d 1297, 1315 (11th Cir. 1985); see also United States v. Noe, 821 F.2d 604, 607 (11th Cir. 1987)(refusing to adopt a rule that would encourage government "trial by ambush" whether intentional or inadvertent). That is precisely what happened here. However, "[i]nadvertence does not render a discovery violation harmless; rather the purpose of rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." Camargo-Vergara, 57 F.3d at 999.

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[11]In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir.1981), this Court adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Moreover, the prejudice caused by admission of this statement was substantial. Failure to disclose a statement by the defendant is an especially serious violation. United States v. Rodriguez, 799 F.2d 649 (11th Cir. 1986).

> "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial."

Id. at 654 (quoting United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969)). Thus, the extent of prejudice is determined "not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant's ability to present a defense." Noe, 821 F.2d at 607 (citing United States v. Pascual, 606 F.2d 561 (5th Cir. 1979)).

For example, in Pascual, the government failed to disclose a letter written by the defendant in violation of Rule 16. 606 F.2d at 564-65. The letter "amounted virtually to a signed plea of guilty." Id. at 565. The letter also corroborated the testimony of a cooperating government witness. Id. The court reversed and

remanded for a new trial.

> It would be hard to make an argument with any degree of plausibility that the use of this letter without prior production did not seriously prejudice the defendants in exercising their option to plead not guilty and in their preparation for trial.

Id. Moreover, the court was unconcerned about the likelihood of the defendant's acquittal on retrial.

> A new trial with this nail in the coffin lid, now fully disclosed, may likely result in another verdict of guilty. Nevertheless, the vindication of Rule 16, and notice to prosecutors in this Circuit that they must effectively comply with it, leave no choice but to reverse these convictions and remand for a new trial.

Id. at 566.

Here, as in Pascual, the alleged 1992 statement amounted to a confession that the defendant was importing narcotics into the United States. Yet the government failed to disclose that statement to the defense. Such a statement has serious implications for plea negotiations and for trial preparation. Putting this

information in the hands of the defense before trial is precisely the reason for Rule 16. See Alvarez, 987 F.2d at 85 (Rule 16 "intended to contribute to the fair and efficient administration of criminal justice by providing the defendant with sufficient information upon which to base an intelligent plea; by minimizing the undesirable effect of surprise at trial; and by contributing to the accuracy of the fact finding process"). The government has been allowed to circumvent those safeguards in this case, to the serious prejudice of Mr. Beharry.

In addition, Officer McAlpin testified that it was because of this incident, and Mr. Beharry's alleged statement when he was pulled over in 1992, that McAlpin was able to identify Mr. Beharry's voice from the taped telephone conversations. (R-576-1217). Also, the very similarity between the 1992 statement and the statements made on the tapes made it more likely that the man on the tapes was Mr. Beharry. Thus, this testimony effectively bolstered other evidence against Mr. Beharry.

The fact that a cooperating witness, Marlon Hall, previously testified to the 1992 statement should provide the government no comfort. Defense counsel learned of the statement for the first time when Hall took the stand at trial. Yet, McAlpin told the government about the statement before trial. If the government had properly disclosed the statement as required by Rule 16, defense counsel would have been prepared to address it at trial when Hall testified.

Moreover, it is one thing when a cooperating government witness testifies to such a statement, but it

is quite another when a police officer verifies the statement, putting a cloak of credibility not only on the statement, but on the cooperating witness as a whole. "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." See Charlot v. State, 679 So.2d 844, 846 (Fla. 4th DCA 1996)(Pariente, J. dissenting). Thus, the government's failure to properly disclose the 1992 statement was doubly prejudicial.

By surprising the defense with the testimony about the alleged 1992 statement, the government prevented Mr. Beharry from investigating the alleged 1992 pullover and from finding and offering evidence to show that the incident never occurred. The damage to the defense trial preparation and strategy was significant. This Court should reverse and remand for a new trial.

D. The government improperly withheld the passport of a government witness which was significant impeachment evidence.

The government also violated Rule 16 and Brady v. Maryland, 373 U.S. 83 (1963), by failing to produce the passport of government witness David Nash as requested by the defense. Defense counsel sought production of Nash's passport, which he had turned over to the government. (R-576-1389, 1397; R-577-1456-57). The district court ordered the government to produce it, but inexplicably, the government was unable

to find it. See (R-576-1391; R-577-1397; R-530-14; R.E. 7). The government was again allowed, without penalty, to ignore disclosure requirements, to the severe prejudice of the defendant.

The government violates Brady if (1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) the defense did not possess nor could have possessed that evidence using reasonable diligence; (3) the government suppressed the evidence; and (4) the evidence was material, i.e., there is a "reasonable probability" that had the evidence been disclosed the trial outcome would have been different. See United States v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997).

"[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyle v. Whitley, 514 U.S. 419, 434 (1995)(discussing United States v. Bagley, 473 U.S. 667 (1985)). The adjective "reasonable" is important. Id. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. This is not a sufficiency of the evidence test. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." Id. Thus, the analysis must look at the importance of the suppressed evidence, not the weight of the inculpatory evidence.

Nash's passport would have shown that he lied

about the dates when he claimed that he was in the United States, and therefore that events could not have occurred as Nash testified. This was significant impeachment material as it would have thrown into doubt all the testimony by this important witness against Mr. Beharry. Mr. Beharry is entitled to a new trial -- at which time the government must produce the passport or Nash's testimony should be excluded.

E. The cumulative effect of these errors requires a new trial.

Even if this Court finds that none of the trial errors individually requires a new trial, this Court should still reverse because of the cumulative effect of these errors. See United States v. Wood, 207 F.3d 1222 (10th Cir. 2000); Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993).

"A cumulative error analysis aggregates all the errors that individually might be harmless, 'and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.'" Id. at 1237 (citation omitted). In addressing a claim of cumulative error, this Court "must examine the trial as a whole to determine whether the appellate was afforded a fundamentally fair trial." United States v. Calderon, 127 F.3d 1314, 1333 (11th Cir. 1997). "[I]f one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Kotteakos v. United States, 328 U.S. 750, 765 (1946).

The fact that an Allen charge was even

necessary, along with the hung jury on the conspiracy counts in the indictment, highlight the fact that the jury considered this a close case. In this context, the pattern of government deception and suppression of evidence becomes even more significant.

Mr. Beharry did not receive a fair trial. Wade Lalla and David Nash were the only two cooperating witnesses who testified about the February 1994 importations for which Mr. Beharry was convicted. Wade Lalla's testimony was purchased by the government and because of the government's misconduct the defense was unable to properly impeach David Nash's testimony because the government did not produce Nash's passport as required by Rule 16 and Brady. Added to this is the substantial prejudice caused the defendant by the government agents' mispresentations about Carlos Manickchand and failure to disclose the statement allegedly made by the defendant to Trinidadian police in violation of Rule 16. These misrepresentations prevented counsel from adequately investigating and preparing a defense. If this Court does not order the indictment dismissed, the cumulative effect of the government's conduct in this case mandates at least a new trial. This Court should reverse.

CONCLUSION

For the reasons set forth above, Appellant ZIMMERN BEHARRY respectfully requests this Court to dismiss the indictment and repatriate him to Trinidad and Tobago. In the alternative, this Court should remand for a new trial, or at the least remand for

resentencing.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(1) undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(1) in that it contains 13,495 (13,473) words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on August __, 2000, a true and correct copy of Defendant/Appellant's Criminal Appeal Brief was served by mail to the following:

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By: _____
ROY BLACK, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 00-11371-J
UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.
ZIMMERN BEHARRY,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S REPLY BRIEF

CRIMINAL APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Zimmern Beharry
Case No. App. No. 00-11371-J

Pursuant to 11th Cir. R. 26.1, Appellant Zimmern Beharry files this Certificate of Interested Persons and Corporate Disclosure Statement:

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ARGUMENT

I. MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND A REASONABLE DOUBT.

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to Mr. Beharry. (R-179; R-514; R.E. 2). Nonetheless, over objection, he was sentenced to life in prison because of the quantity of drugs attributed to him by the district court at sentencing. (R-587-2957-58; R-549). Under the United States Supreme Court's decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and this Court's recent decision applying Apprendi in United States v. Rogers, 2000 WL 1451907 (11th Cir. Sept. 29, 2000)(Apprendi applicable to §841), Mr. Beharry is entitled to at least a resentencing under 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3).[12]

Plain Error Standard Not Applicable. First, Mr. Beharry objected at sentencing to the quantity of drugs attributed to him for sentencing purposes, and to the standard used by the court to make that

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[1]Although this Court ruled in Rogers that the appropriate remedy is resentencing, Appellant does not concede that this is the proper remedy.

determination. See (R-545; R-546; R-587-2947). At that time, the law in this Circuit was clear that drug quantity was to be determined by the district judge at sentencing under the preponderance of the evidence standard, and not by the jury. See United States v. Hester, 199 F.3d 1287 (11th Cir. 2000). Indeed, this Court had explicitly and unequivocally rejected any argument that the Supreme Court's opinion in Jones v. United States, 526 U.S. 227 (1999), indicated otherwise. Hester, 199 F.3d at 1291. Because the Supreme Court's opinion in Apprendi was not released until after Mr. Beharry's sentencing, the objections made at sentencing sufficiently preserved the issue for de novo review. See Rogers, 2000 WL 1451907; United States v. Angle, 2000 WL 1515159 (4th Cir. Oct. 12, 2000).

Further, Mr. Beharry's argument was also based on the failure of the government to set forth all elements in the indictment, an issue which may be raised at any time. See Fed.R.Crim.P. 12(b)(2); but see United States v. Mojica-Baez, 2000 WL 1211013 (1st Cir. June 8, 2000).

This Court's decision in United States v. Swatzie, 2000 WL 1421337 (11th Cir. Sept. 27, 2000), does not mandate applying the plain error standard in this case. In Swatzie, unlike this case, the defendant made only a pro forma objection to the presentence report's findings on drug quantity. Id. at *1. This Court therefore found that objection insufficient to preserve the issue and applied a plain error standard of review. See id. at *2-3. By contrast, Mr. Beharry's

objections to drug quantity were substantially more than pro forma. From the time defense counsel filed objections to the presentence report through the actual sentencing, Mr. Beharry vigorously challenged his guilt, the amount of drugs attributed to him, and the standard for making that determination. This issue was preserved, and Mr. Beharry is entitled to the benefit of the new law set forth in Apprendi and Rogers in this direct appeal. See Griffith v. Kentucky, 479 U.S. 314 (1987).

Plain Error Standard Met. Second, even under the plain error standard, Mr. Beharry is still entitled to relief. Under that standard, the appellant must show "(1) error, (2) that is plain, and (3) that affect[s] substantial rights" and (4) that "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 466-67 (1997). The government at 20 concedes the first two elements of this test.

The error also significantly affected Mr. Beharry's substantial rights. This Court in Swatzie applied the harmless error approach used in Neder v. United States, 527 U.S. 1 (1999), to analyze this requirement.[13] 2000 WL 1421337. Under that standard, the court must reverse if there is "grave doubt" that the plain error "had substantial influence"

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[2]But see United States v. Nordby, 225 F.3d 1053, 1062 (9th Cir. 2000) (Reinhardt, J. concurring specially)(arguing against application of Neder approach in this context).

on the outcome. Swatzie, 2000 WL 1421337.

The best evidence that this plain error affected Mr. Beharry's substantial rights is the fact that he received a mandatory life sentence under 21 U.S.C. §841(b)(1)(A) and §960(b)(1)(B) instead of a maximum of 20 years under §841(b)(1)(C) and §960(b)(3). See United States v. Anderson, 201 F.3d 1145, 1152 (9th Cir. 2000). "An error that results in a longer sentence undoubtedly affects substantial rights." Id.; see also United States v. Nordby, 225 F.2d 1053, 1060 (9th Cir. 2000) (recognizing this as one approach to determining if plain error affected substantial rights).

Unlike the defendant in Neder, Mr. Beharry was essentially sentenced for different crimes from the ones for which he was convicted and his sentence exceeded the statutory maximum for the crimes for which he was actually convicted. In Neder, the defendant was convicted and sentenced for the same crime -- the jury simply was not given all the elements of that crime. See 527 U.S. at 5. By contrast, under the jury's verdict, Mr. Beharry was convicted of one set of crimes -- possession and importation of an unspecified amount of cocaine base under §§ 841(b)(1)(C) and 960(b)(3), see Rogers, 2000 WL 1451907, but was sentenced for a different set of crimes -- possession and importation of a specific quantity of cocaine base under §§841(b)(1)(A) and 960(b)(1)(B). Sections 841(b)(1)(C) and 960(b)(3) carry a maximum penalty 20 years in prison. Mr. Beharry was sentenced to life.

In United States v. Meshack, 225 F.3d 556 (5th Cir. 2000), the Fifth Circuit applied Apprendi to the

sentences of two co-defendants using the plain error standard. The court found no violation of defendant Hodges' substantial rights because Hodges could not show that he received a longer sentence for possession of marijuana than he would have if the error had not been committed. Id. at 577. However, the court found that a different result was necessary for defendant Meshack under the plain error standard because his life sentences were "longer, at least in theory, than" concurrent sentences he received on other counts under §841(b)(1)(C). Id. at 578. The court therefore vacated Meshack's life sentences and remanded for resentencing. Id.

The same reasoning and result should apply here. This Court should find that Mr. Beharry's substantial rights have been affected and vacate his life sentences because they are longer, at least in theory, than the 20 year maximum he could have received under §§841(b)(1)(C) and 960(b)(3).

Moreover, as the circumstances of this case are far different from those this Court found insufficient in Swatzie they mandate a different result. In Swatzie, 2000 WL 142337, the defendant offered no evidence at trial and made only a pro forma and conclusory objection to the drug quantity listed in the presentence report. When Swatzie was arrested, he led the authorities to more than 100 grams of cocaine and around twenty grams of cocaine base in his house. Id. at *4. He admitted possession of the cocaine and cocaine base and offered no evidence to dispute that he had made that admission. Id. Indeed, even when given

the opportunity at sentencing, he "did not seek to discredit the sources of the evidence against him." Id. Under those circumstances, where there was no "real dispute" over drug quantity, this Court stated that "we can confidently say that whatever the circumstances in some cases may be, there is not a grave doubt here about the lack of effect." Id. at *5; see also id. at *4 n.3. Moreover, Swatzie did not even "hint[] that, for lack of notice from the indictment, he had difficulty disputing the issues of either the kind of drugs or the quantity." Id. at *6.

In dramatic contrast to Swatzie, Mr. Beharry vigorously defended the charges against him and presented evidence in his defense. Mr. Beharry's first "Objections to the Presentence Investigation Report and Motion for Downward Departure," began with an overall objection to the factual allegations in the PSI regarding the offense conduct and an objection "to having joined any drug conspiracy or having been involved in any drug activities." (R-545). Mr. Beharry also objected to the proposed drug quantity in the PSI as there was no specific credible information regarding drug amounts -- most of the information came from cooperating government witnesses who admitted they lied to the government about Mr. Beharry's alleged involvement with narcotics. (R-545, 546, 548, 587). Moreover, the vast majority of drugs attributed to Mr. Beharry at sentencing came from incidents that would have been part of the broad conspiracies the government alleged Mr. Beharry participated in, but which the jury rejected. See (R-545; R-587). Mr.

Beharry further objected to and moved to strike the many factual allegations in the PSI not derived from trial testimony. (R-545, 546, 548, 587). These objections went far beyond the pro forma objections made in Swatzie.

The Ninth Circuit addressed a similar situation in Nordby, 225 F.3d 1053. In that case, the uncontested evidence at trial was that 2000 marijuana plants were found growing on the defendant's land. Id. at 1060. Yet, the defendant consistently maintained his innocence and presented evidence in his defense, even at sentencing. Id. at 1060-61. For example, the evidence showed that he had been away for most of the time the marijuana crop had been growing, although he returned several days before he was arrested. Id. at 1060. The court found that even under the Neder test, the defendant's substantial rights had been affected and remanded for resentencing. Id. at 1061-62.

Similarly, here, Mr. Beharry contested his guilt at trial, and continued to maintain his innocence at the time of sentencing. No witness saw Mr. Beharry in possession of cocaine. See (R-576-1330-33; R-577-1535, 1556). Indeed, Mr. Beharry was not even named in relation to this case until the Fourth Superseding Indictment. See (R-145). Despite the government's attempts to describe the evidence in this case as "overwhelming," the jury nonetheless must have disagreed as it refused to convict Mr. Beharry of the broad conspiracy charges against him. See (R-514).

Although the government submitted evidence of admissions by Mr. Beharry to drug trafficking, both

before and during trial Mr. Beharry challenged admission of that evidence,[14] the authenticity of the tape recordings, and the accuracy of the testimony. E.g., (R-425). More importantly, those statements were not admissions to participating in the two specific importations for which Mr. Beharry was convicted. See (R-576-1229, 1231, 1309; R-578-1862). In spite of this evidence, the jury did **not** convict Mr. Beharry of the broader conspiracy charges against him.

The government also relies heavily on statements by defense counsel in sentencing motions and at the sentencing hearing, taken out of context, that the defendant was responsible for 46 kilograms of cocaine. This reliance is misplaced and mischaracterizes the circumstances of defendant's sentencing.

First, statements made by the defendant or his attorney for the purposes of sentencing are irrelevant to this inquiry. "By its own terms the harmless error/substantial rights inquiry is directed at whether the error affected the jury's verdict." Nordby, 225 F.3d at 1061 n.6. Statements made at sentencing could not have affected the jury's verdict.

Second, those remarks must be viewed in the context of Mr. Beharry's sentencing. After making overall challenges to all of the factual allegations in the PSI, including his guilt and drug quantity, Mr. Beharry

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[3]In fact, Mr. Beharry continues to challenge admission of some of that evidence in this Court. See Appellant's Initial Brief at 48.

went on to argue that the largest quantity of drugs for which he could be held responsible was the 46 kilograms of cocaine allegedly involved in the two shipments for which he was convicted. (R-545-2). Similar arguments were made at the sentencing proceeding, where defense counsel meticulously objected to specific amounts and sources for the PSI's allegations of drug quantity. See (R-587-2968, 2971-72). Defense counsel also argued that the district court should apply a higher standard than preponderance of the evidence.[15] (R-587-2947).

Thus, in context, neither Mr. Beharry or his defense counsel admitted that Mr. Beharry was responsible for 46 kilograms of cocaine base. Instead, counsel argued that if any drug quantity were to be attributed to Mr. Beharry, 46 kilograms was the most that could be found, and then only **by a preponderance of the evidence**, not beyond a reasonable doubt.

Moreover, any analysis of the evidence of drug quantity presented at trial must take into account the fact that drug quantity was not listed in the indictment. Because it was not listed in the indictment, Mr. Beharry had no notice of the significance of drug quantity to the overall verdict. Under the state of the law at the time of

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[4]There is some support in the law of other circuits for applying a clear and convincing standard during sentencing where the fact at issue would dramatically increase the sentence. See United States v. Watts, 519 U.S. 148, 156 & n.2 (1997)(collecting cases).

Mr. Beharry's trial, the government was not required to allege or prove a specific drug quantity. Moreover, the determination of drug quantity would be made by the district court by a preponderance of the evidence at sentencing. Thus, there was no legal basis for the defense to contest the amounts alleged to be part of those shipments at trial. Indeed, as drug quantity would not have been treated as an element of the offense, any attempt by the defense to focus on those drug quantity would have only confused the jury and detracted from the overall defense that Mr. Beharry was simply not involved. Further, given the relatively low preponderance of the evidence standard, there was no legal basis to challenge the quantity of drugs from those shipments at sentencing either. As the jury rejected the broader conspiracy charges brought by the government, there is a significant probability that the jury would also have rejected the quantities alleged by the government. The third element of the plain error test is amply satisfied in this case.

Lastly, if this is not a situation that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," it is difficult to see when that standard would ever be met. As the Supreme Court stated in Apprendi, "[a]t stake in this case are constitutional protections of **surpassing importance**: the 'due process of law,' and the guarantee that '[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'" 120 S.Ct. at 1255 (citations omitted, emphasis added). Indeed, "[t]he rights to jury trial and a determination of

guilty beyond a reasonable doubt are the bedrock of our constitutional system of justice. Moreover, fairness is undermined when a court's error 'impose[s] a longer sentence than might have been imposed had the court not plainly erred.'" Nordby, 225 F.3d at 1061 (citations omitted).

The fairness of our justice system is also seriously undermined where, as here, a defendant is convicted for one crime, but sentenced for another--far more serious--crime. This is especially true where the jury has rejected much of the government's evidence. Mr. Beharry was deprived of the right to have notice in the indictment of the full extent of the charges against him, and to have all the elements of those charges determined by the jury beyond a reasonable doubt. Even under the plain error standard, Mr. Beharry is entitled to at least a resentencing.

Rationale of *Apprendi* applies to Federal Sentencing Guidelines. Although the federal sentencing guidelines were not before the Supreme Court when it decided Apprendi, the Court clearly telegraphed that it would apply the same constitutional considerations when a sentencing court, using the Guidelines, significantly increases a defendant's sentence based on elements not presented the jury. The Court stated as it's rationale that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 120 S.Ct. at 2363

(citation omitted). Moreover,

> it can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.

Id. If the difference of 10 years -- from 10 to 20 years -- is of "unquestionable constitutional significance," then the variation here, between 10 years and life, must be as well. Drug quantity is the single most important factor in determining the sentence within that range.

If Congress, a constitutional body elected by the people, cannot constitutionally remove from the jury the assessment of facts that more than double a potential criminal sentence, then it simply cannot be constitutional for the statutorily created, appointed, United States Sentencing Commission to do so. Moreover, as Justice Thomas points out in his concurring opinion in Apprendi, the Sentencing Guidelines "'have the force and effect of laws.'" 120 S.Ct. at 2380 n.11 (Thomas, J. Concurring)(quoting Mistretta v. United States, 488 U.S. 361, 413 (1989)(Scalia, J. Dissenting)). Justice Scalia's concurrence also implies that the Sentencing Guidelines

would come within the reasoning of Apprendi by stating that the right to trial by jury "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant **to a legally prescribed punishment** must be found by the jury." 120 S.Ct. at 2367 (Scalia, J. Concurring)(emphasis added).

A contrary reading of Apprendi would allow the legislature to provide a statutory maximum of life imprisonment for **all** crimes, with the primary determinative factor for sentencing within that maximum dictated by the Guidelines. Indeed, Justice O'Connor suggested that interpretation of the majority opinion in her dissent, 120 S.Ct. at 2388-90 (O'Connor, J. dissenting), but the majority rejected it and questioned the constitutionality of such a statutory scheme. See 120 S.Ct. at 2363 n.16.

Yet, precisely that type of statutory scheme is at work here. The statutory sentencing range for these offenses is 10 years to life, and drug quantity is the single most important factor in determining what the punishment will be within that enormous range under the Guidelines. In United States v. Watts, 519 U.S. 148 (1997), the Court recognized that although it has ruled in McMillan v. Pennsylvania, 477 U.S. 79 (1986), "that application of the preponderance standard at sentencing **generally** satisfies due process," that case left open the possibility that due process would require a higher standard when the relevant conduct would "dramatically increase" the sentence, and some circuits have so held. Watts, 519 U.S. At 156 & n.2 (collecting cases,

emphasis added). For example, the Eighth Circuit stated in United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991), that "[a]t the very least, McMillan allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense.'"

The Supreme Court was not presented with that situation in Watts. See 519 U.S. at 156-57. However, where, as here, drug quantity determines whether a defendant is sentenced to 10 years or is sentenced to more than 20 years or life, it becomes "a tail which wags the dog of the substantive offense." See McMillan. Apprendi suggests that due process requires that drug quantity be determined by a jury beyond a reasonable doubt. Indeed, the Court in Apprendi made it clear that "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365. The answer here must be yes. Especially as the jury's verdict found Mr. Beharry guilty of only an undetermined amount of cocaine, the maximum punishment should be 20 years.

The cases cited by the government do not mandate a contrary result. In none of those cases was the Supreme Court squarely presented with a due process challenge to allowing the district court to determine the single most significant factor in

sentencing drug cases under the Guidelines -- drug quantity. Watts, 519 U.S. 148, and Witte v. United States, 515 U.S. 389 (1995), both involved double jeopardy challenges to the Guidelines scheme for drug convictions, not due process.

In Edwards v. United States, 523 U.S. 511 (1998), which in some ways telegraphed the Court's later decision in Apprendi, the Court addressed a challenge to district court determination of the type of drug, not quantity. Moreover, the Court did not address the constitutional question directly because in that case the defendant raised the argument for the first time on appeal, but did not show how he had been prejudiced. Id. at 514-15. In fact, the Court noted that in that particular case the type of drug would not have made any difference. Id.

In sum, Mr. Beharry's indictment, conviction, and sentence violated his Fifth and Sixth Amendment rights. Even under the plain error standard, Mr. Beharry is entitled to at least resentencing for the offenses of which he was convicted: 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3).

II. THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

This case presents perhaps the best example of

when an Allen charge has an unduly coercive impact on the jury -- where the dissenting juror informs the court that she fears for her **physical safety** in the jury room. Nonetheless, the government claims that the district court did not abuse its discretion in giving the charge over defense objection. The government's argument ignores reality.

Significantly, the government concedes at 30 that Juror Best expressed concern for her physical safety. Indeed, she voiced that fear more than once. It was the way she first came to the attention of the court. The district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that the Juror 8 "does not feel **safe** in the jury room and needed the bailiff." (R-585-2810)(emphasis added).

That note, clearly stating Juror Best's concern for her **safety**, was the reason the district court spoke to her outside the presence of the other jurors. (R-585-2832). At that time, this strong, independent woman was visibly upset and crying, even though she stated that she rarely cried. See (R-585-2833, 2836). Twice during her interview with the district judge, Juror Best clearly expressed her fear for her physical safety:

> THE COURT: Now I want to ask you, do you feel or do you have a concern for your **physical safety**?
>
> MS. BEST: **At certain moments in there, yes**.

* * *

MS. BEST: Well, I haven't been struck.

THE COURT: But are you in fear that could happen?

MS. BEST: I think the conversations, tones, and level of the voice . . . **But I think that that could move to something more physical** . . . .

(R-585-2834-36)(emphasis added).

The district court used the word "civility" to describe the discussion in the jury room; it was not Juror Best's word. See (R-585-2834-36). She also clearly stated that "civility" was only "**part of it**." (R-585-2834-26)(emphasis added). Moreover, her acquiescence in that description makes sense in context: She had not been stuck yet, and loud, foul language had been used. See (R-585-2834-36); see also Random House Webster's Unabridged Dictionary 378 (2d ed. 1998)(defining "civil" as "adhering to the norms of polite social intercourse"). However, the lack of "civility" was so severe that she was brought to tears, and feared for her physical safety. Indeed, the juror's first note indicated that she needed that the bailiff, a law enforcement officer, to be inside the jury room for her protection.

This clearly expressed concern for her physical safety distinguishes this case from all the cases cited by the government where an Allen charge was affirmed. None involved a juror's expressed concern for her physical safety in the jury room.

Nor, in context, is there any reasoned doubt that Juror Best was a holdout. There would be no reason for the other jurors to express such hostility towards her otherwise. More importantly, after speaking with the district judge, Juror Best knew that the judge was aware of her concerns, and gave the Allen charge anyway. See United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984). The government's argument that the district court did not know that Juror Best was a dissenting juror also ignores reality.

Furthermore, after the district court gave the Allen charge, the jury, which had struggled for several days to reach a verdict on one count, returned a verdict on three more counts in a matter of hours. Although by itself this may not suggest coercion, in the context of Juror Best's expressed concerns for her physical safety, the speed with which the jury returned a verdict is very telling. See United States v. Bonam, 772 F.2d 1449, 1451 (9th Cir. 1985)("A jury verdict reached immediately after an Allen charge can be an indication of coercion.").

A comparison of this case and those cited by the government highlights the problem with giving the charge in this case. In none of those cases was there even any evidence of extreme frustration by the jurors over the deadlock -- let alone the potential for physical coercion. For example, the court in Bonam expressly noted that there was "**no indication** that the instruction was given in an atmosphere of **frustration** over the deadlock and no indication that the trial judge knew how the jurors stood." Id. at 1451 (emphasis added).

The court also noted that the jury in that case had only one relatively simple issue to resolve. Id. By contrast, here there were multiple complex charges to consider and clear evidence of an atmosphere beyond mere frustration in the jury room.

In United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994), the district court gave the Allen charge immediately after discovering from the jury poll that the verdict was not unanimous. There was no indication that the deliberations had been anything less than civil. Under those circumstances, the fifteen minutes the jury took to return a unanimous verdict was as likely to have been an indication of confusion by the jurors as it was of coercion. See id. at 545.

Similarly, the jury in Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), had only been deliberating an hour and five minutes before the district court gave the Allen charge -- hardly enough time to build excessive frustration. By contrast, here the jury had deliberated for several days before the charge was given.

Lastly, the government's reliance on United States v. Alonso, 740 F.2d 862 (11th Cir. 1984), and United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated in part on other grounds, 836 F.2d 1312 (11th Cir. 1988), is misplaced. Again, neither case involved expressed fears by a juror for her physical safety in the jury room. Moreover, in Alonso, cited in Gordon, the jury did not even begin to return verdicts on the remaining counts until **five days** after the district court gave the Allen charge. 740 F.2d at 878. Others

verdicts were returned more than a week after the charge. In contrast to the length of time between the charge and the verdicts in Alonso, the quick verdict in this case clearly indicates that the Allen charge had a coercive effect on Mr. Beharry's jury.

Given the severity of Juror Best's expressed concerns for her physical safety, the complexity of the issues, and the relative speed with which the jury returned verdicts on counts on which it had previously been deadlocked for days, the circumstances overwhelmingly show that giving an Allen charge was inherently and unduly coercive. This case must be reversed and remanded for a new trial.

III. THE GOVERNMENT ENGAGED IN A PATTERN OF MISCONDUCT THAT SUBSTANTIALLY PREJUDICED MR. BEHARRY.

The most significant problem with the government's response is that it dismisses out of hand the cumulative effect of the government misconduct in this case. The fact that an Allen charge was even necessary, along with the hung jury on the conspiracy counts, highlights the fact that the jury considered this a close case. In this context, the pattern of government deception and suppression of evidence becomes even more significant.

Mr. Beharry did not receive a fair trial. Wade

Lalla and David Nash were the only two cooperating witnesses who testified about the February 1994 importations for which Mr. Beharry was convicted. Wade Lalla's grand jury testimony was purchased by the government and because of the government's misconduct the defense was unable to properly impeach David Nash's testimony because the government did not produce Nash's passport as required by Rule 16 and Brady. Added to this is the prejudice caused by the government agents' misrepresentations about Carlos Manickchand and failure to disclose the statement allegedly made by the defendant to Trinidadian police in violation of Rule 16. These misrepresentations prevented counsel from adequately investigating and preparing a defense both for extradition and later for trial. The government attempts to explain away, rationalize, and misdirect the court's attention from the real issue in this case: What government actions are we as a society willing to tolerate in pursuit of a criminal conviction? Mr. Beharry respectfully suggests that the government's actions in this case, especially when viewed as a whole, go beyond what should be acceptable in a free society.

For example, although government agents sometimes need to protect the identity of confidential informants, the proper procedure should be to seek a protective order, not to unabashedly lie to the grand jury or the court and then claim some administrative rule permits lying in court. The government does not have the right to decide how much truth the court is entitled to. See United States v. Sterba, 22 F.Supp.2d 1333,

1338 (M.D.Fla. 1998). Yet that is precisely what Agent Duffy did.

Agent Duffy's testimony at trial shows how deliberate the lie was. He claimed his statements had been technically correct because they referred to the fictitious Carlos Manaracha, not Carlos Manickchand -- even though he knew that there was no such person as Carlos Manaracha. (R-578-1830-31). Indeed, Agent Duffy stated that if he had not been otherwise instructed by the court, he would have continued to testify that the person with Wade Lalla was Carlos Manaracha -- a fugitive. (R-578-1831-32). After all, he had already given such testimony in the separate trial of alleged co-conspirator Rampresad. See (R-529-Exh.E). Significantly, unlike Duffy, AUSA Reinhart recognized during trial that without the court's order Duffy would not be answering "truthfully." (R-578-1818).

Carlos Manickchand was not a co-conspirator or a fugitive -- he was an informant working for Agents Duffy and Mancini all along. (R-578-1830). This was a deliberate and calculated lie, chosen to make it seem as though there was another individual working with Mr. Beharry who managed to get away. These actions violated Mr. Beharry's due process rights and the extradition treaty between the United States and Trinidad.

The government suggests that perhaps some of the problems were transcription errors, that the statements made were not before the grand jury at the precise time Mr. Beharry was indicted, and that transcripts of that grand jury would show no

misrepresentations were made at that time. First, the government's claims at 36 that the name discrepancy was merely a product of confusion and transcription error is mere speculation and is belied by Agent Duffy's and AUSA Reinhart's statements at trial, and by a comparison of statements made by the government at different times in this prosecution. See (R-524, 55, 529, 530, 533, 538). Second, there was a whole chain of indictments in this and related cases. By the time Mr. Beharry was first indicted, the government was on its fifth indictment (Fourth Superseding Indictment). (R-145). There were also related cases involving co-defendant Wade Lalla and others. Moreover, the same government witnesses made the same misstatements in affidavits to the court in Trinidad. See (R-533-Exh.G; R-578-1826, 1841-42). Arguing that some of the statements quoted were from a different grand jury hearing from the one in which Mr. Beharry was indicted misses the point.[16]

The government's argument about the effect of these misstatements on Mr. Beharry's extradition similarly misses the point. First, the treaty required "sufficient evidence" that the person sought to be extradited committed the alleged offense. See

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[5]Appellant is also concerned about the government's claim at 39 n.19 that it can prove no misstatement were made in Mr. Beharry's grand jury with transcripts. If there is additional grand jury testimony by Agent Duffy, it should have been turned over to the defense under Jencks.

Extradition Treaty Between the U.S. And Great Britain of 1931, arts, 9, 11, 47 Stat. 2122. "Sufficient evidence" simply cannot include known falsehoods. Any other interpretation makes a mockery of our treaty obligations. Second, it is up to the foreign court to determine if the evidence is sufficient. However, as the truth was not known until trial, the court in Trinidad was not aware that U.S. Government agents were lying, and so could not accurately gauge their credibility. Moreover, those misrepresentations prevented Mr. Beharry from investigating the government's primary source of information and from presenting evidence to the court in Trinidad about that individual.[17] As the extraditing court denied the request for extradition on some of the charges, it clearly was carefully weighing the evidence presented. The government's conduct violated the treaty and severely prejudiced Mr. Beharry.

Next, it simply cannot be permissible for the government to pay a cooperating witness $5,000 for "securing the indictment" in a case. As Wade Lalla testified before Mr. Beharry's grand jury, a fact the government does not dispute, it was payment for

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[6]The government at 43 also makes the ludicrous statement that it "was under no obligation to disclose the last name of defendant's own employee." However, Mr. Beharry had not been adjudicated guilty at the time disclosure was required. The government is not entitled to choose how to respond to discovery requests based on assumptions that would only be valid if the defendant were guilty.

"testimony" prohibited under 18 U.S.C. § 201(c)(2).

Moreover, contrary to the government's claims, the evidence that this was in fact why Wade Lalla was paid comes not only from the government's own voucher, compelling by itself, but from Lalla's testimony at trial. See (R-577-1607). Also, no request for hearing was made in Mr. Beharry's post trial motions because the District Court had already stated a hearing would be granted on this issue, no request for hearing was necessary. See (R-2349). Nonetheless, the district court denied the motions without a hearing. See (R-538).

The government's payment of a cash reward to its main cooperating witness sets this case apart from other cases dealing with illegal procurement of the testimony of government witnesses. Unlike leniency or expense money, there is no long-established statutory or historical basis for allowing prosecutors to pay cash rewards for securing an indictment. See United States v. Hunte, 193 F.3d 173 (3d Cir.1999); United States v. Condon, 170 F.3d 687 (7th Cir. 1999).

In Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897 (2000), the Supreme Court upheld the constitutionality of a Missouri statute limiting to $1,000 individual contributions to state political candidates. Concerned about the integrity of our electoral process, Justice Souter explained that capping individual political contributions is necessary because money corrupts. See id. at 905. Contributions exceeding $1,000 can pervert the electoral process and motivate officials to act contrary to their obligations. See id.

In our case, the evidence shows that the DEA paid Wade Lalla five times that amount to secure the indictment against Mr. Beharry. Moreover, once Lalla testified a certain way under oath, he would of necessity testify the same way at trial. Thus, that payment tainted Lalla's trial testimony as well. The government's argument that the payment and admission of Lalla's testimony is permissible ignores reality.

Significantly, the government does not dispute either that the government failed to disclose Officer MacAlpin's testimony or the witness Nash's passport was lost while in the possession of the government. These are simply further examples of the pattern of government misconduct in this case.[18] And that pattern is why this case is so disturbing. If this Court does not order the indictment dismissed, the cumulative effect of the government's conduct in this case mandates at least a new trial. This Court should reverse.

CONCLUSION

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[7]By alleging that this was part of the pattern of government misconduct in this case, Appellant has implicitly alleged that the loss of Nash's passport was not a mere mistake. This distinguishes this case from United States v. Rodriguez, 917 F.2d 1286 (11th Cir. 1990), vacated in part on other grounds, 935 F.2d 1941 (11th Cir. 1991). Without an evidentiary hearing it is impossible to know how or why it was misplaced. However, the district court denied a hearing on this issue when it denied a hearing on Mr. Beharry's post-trial motions. See (R-538).

For the reasons set forth above, Appellant ZIMMERN BEHARRY respectfully requests this Court to dismiss the indictment and repatriate him to Trinidad and Tobago. In the alternative, this Court should remand for a new trial, or at the least a resentencing.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(1) undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(1) in that it contains 6,369 words.

Respectfully submitted,
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on November __, 2000, a true and correct copy of Defendant/Appellant's Criminal Appeal Brief was served by mail to the following: Sangita Rao, Esq., Department of Justice, Criminal Appellate Section, 601 D Street, N.W.,Suite 6206, Washington, DC 20530

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